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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1220

FRANK CARMINE NARDONE AND NATHAN W. HOFFMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 564–568) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 23, 1942 (R. 568–569). The petition for a writ of certiorari was filed May 6, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the findings of the trial court, which were upheld by the circuit court of appeals, that the Government's evidence was derived from sources independent of illegally intercepted communications, are supported by proof.

2. Whether petitioners have standing to object to the Government's obtention from Western Union of copies of telegraphic communications sent by their co-conspirators.

3. Whether the trial court erred in refusing to instruct the jury not to consider the acts or declarations of a co-conspirator as against petitioners unless satisfied that petitioners at the time had entered the conspiracy.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (47 U. S. C. 605), provides in part:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, * * * or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority, and no

person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * *.

STATEMENT

This case is a sequel to *Nardone* v. *United States,* 302 U. S. 379, and *Nardone* v. *United States,* 308 U. S. 338.

Following this Court's reversal of petitioners' convictions and the remand of the cause in the second *Nardone* case and prior to the third trial, petitioners applied to the trial court for an order suppressing, *inter alia,* all intercepted telephone and telegraph messages and all evidence obtained by the use of such messages (R. 20–22, 198–199). A preliminary hearing was held in conformity with the practice outlined by this Court in its opinion in the second *Nardone* case. At the close of the hearing the trial judge rendered an oral opinion (R.

191–197) and ordered the suppression of (1) all records and transcripts of intercepted telephonic and telegraphic communications and telegraphic money orders, (2) all evidence obtained by the Government as a result of the use of such intercepted communications and the testimony of all witnesses whose recollections were refreshed or whose testimony was in any way aided by means of such messages, and (3) all testimony which resulted from information derived from such messages (R. 201–204, 20–21). Thereafter, the judge issued findings of fact and conclusions of law (R. 206–211).

The trial judge found that Government agents had intercepted certain telephone and telegraph communications in violation of law. He further found, however, that the identity and existence of petitioners, their associates, and the prosecution witnesses were known to the Government independently of any intercepted communications or information or clues derived therefrom; that no Government witness was obtained by reason of any such intercepted communications or clues; that no use was made by the Government of any intercepted communications or clues to induce any witness to confess and become a witness for the prosecution or to refresh the recollection of any witness; that the Government learned the details of the conspiracy and of petitioners' participation therein from sources independent of any intercepted communications or any information or clues derived therefrom; and that "The testimony and the evi-

dence offered by the Government at this trial were derived wholly and completely from sources independent of any intercepted telephone, telegraph, radio or wireless communications, or information, clues or leads obtained therefrom" (R. 207–210).

Petitioners were tried before a jury under the same indictment as that involved in the second *Nardone* case, which charged them and four others in two counts with smuggling and concealing alcohol in violation of the Tariff Act of 1930 (19 U. S. C. 1593 (a) and (b)) and in a third count with conspiracy (R. 6–18). They were found guilty on all three counts (R. 529). Nardone received concurrent sentences of eighteen months on each of the three counts and a $1,500 fine on the third (R. 540), and Hoffman concurrent sentences of one year and a day on each count and a $1,000 fine on the third (R. 542).

The circuit court of appeals affirmed the judgments (R. 564–568). It held that the proof introduced at the preliminary hearing supported the trial judge's finding that the Government's evidence at the trial was derived entirely from sources independent of the interceptions and any information or clues derived from them (R. 564–567).

ARGUMENT

I

Petitioners do not dispute the sufficiency of the evidence to support the verdicts if the evidence was admissible. Nor do they now place much em-

phasis on the telephone interceptions which were involved in the first and second *Nardone* cases. They contend principally that all or most of the Government's evidence was inadmissible by reason of the investigating agents' obtention of telegraphic communications. Chief reliance is placed on the alleged illegal obtention of one telegram and two money orders which were sent prior to any wire tapping and which are claimed to have spurred the agents to press the investigation which ultimately uncovered the evidence resulting in the convictions (Pet. 6–9, 12–14).

A. The pertinent circumstances with respect to the telegraphic communications are as follows: On December 16, 1935, Dunn, an Alcohol Tax Unit investigator (R. 160), observed Erickson, a co-conspirator, sending telegrams or money orders from the Western Union desk in the Hotel Astor lobby (R. 160–161; see also R. 47–48). Dunn asked the Western Union operator to show him what Erickson had submitted for transmission; the operator refused (R. 48). The following day arrangements were made with Western Union to see what Erickson had sent and Dunn was shown two money orders and one telegram, which he copied (R. 48, 161, 565). The money orders transmitted funds to accomplices in Nova Scotia and the telegram made an appointment for a telephone call (R. 565). After seeing the copies, Dunigan, the Alcohol Tax Unit supervisor, submitted to West-

ern Union a list of names with a request that the company search its records for telegrams to and from the named persons (R. 48–49). In his testimony at the preliminary hearing Dunigan did not name either of the petitioners among those whose names were submitted to the company (R. 49–50). The company made the search and furnished a list of such telegrams. The contents of these did not become known to the Government, however, until they were subpoenaed by the United States Attorney on April 2, 1936 (R. 50, 90–91, 100–104), after petitioner Nardone and others had been arrested at the Belfort Restaurant (R. 62, 145). Two of these telegrams were cryptic messages of no especial significance and the remainder were money orders transmitting funds to accomplices in Nova Scotia (R. 565). None of the telegrams or money orders was introduced at the trial but it is contended that they had a contaminating influence in that they convinced Dunigan that a conspiracy existed and that the investigation should be continued (Pet. 6–9, 12–14).

Assuming that knowledge of the telegrams and money orders did play a part in influencing the Government agents to pursue the case, such alleged causal connection with the evidence put in at the trial was at best "so attenuated as to dissipate the taint." *Nardone* v. *United States,* 308 U. S. 338, 341. Moreover, since the telegram and money orders of December 16, 1935, were sent by Erickson

(R. 160, 565),[1] petitioners have no standing to complain of their obtention. *Goldstein* v. *United States,* decided April 27, 1942 (No. 256, this Term). Furthermore, with respect both to those communications and to the telegrams and money orders later subpoenaed, it is by no means clear that the Government agents were guilty of any violation of Section 605.[2]

B. Petitioners assert that clues and leads of vital importance were directly derived from the interception of telegrams and telephone conversations (Pet. 14). This contention is unsupported by any reference to a specific instance and is directly contrary to the findings of the trial court which were sustained by the court below. *Supra,* pp. 4–5.

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[1] The telegram and money orders were put in evidence at the preliminary hearing as Government's Exhibit 2 (R. 48). Pursuant to stipulation (R. 553) the exhibits have been omitted from the printed record.

[2] In the court below the Government urged, *inter alia,* (1) that there was no "interception" of the communications within the meaning of Section 605 because they had already been transmitted to the addressees at the time their contents were divulged to the Government officers; (2) that the divulgence of the communications by Western Union was in response to demands of lawful authority and therefore within the authorization of the first clause of Section 605 (*supra,* p. 2); and (3) that Section 605 does not prohibit the Government's use of telegraphic communications divulged by the telegraph company. The court below did not pass on these contentions, and, in view of the concurrent findings of the two courts below and of the fact that petitioners were not parties to the communications principally complained of, we do not deem it necessary to argue them here.

Also unsupported by evidence and opposed by the findings is the implied claim (Pet. 15, 8) that the Government became aware of the activities of co-conspirators Leveque and Geiger and secured their testimony by resort to and use of interceptions. The record establishes that the testimony of each was in no way induced by intercepted communications.

Leveque.—Dunigan had been aware for some time prior to November 1935 that Leveque was a smuggler (R. 39). Murray, formerly a radio operator for rum syndicates, knew Leveque and knew that he was engaged in smuggling operations (R. 39, 46, 184). Murray became an informer and in the summer or fall of 1935 he advised Dunigan that Leveque, petitioners, and others were operating a smuggling ring (R. 38–39, 113–115). Dunigan also knew that certain boats owned by Leveque and the defendant Erickson had been used in smuggling alcohol (R. 30–35, 38–44, 156–159). Leveque was identified as having been present at an exchange of gunfire between investigators and smugglers when the latter were discovered unloading alcohol in New Jersey on November 22, 1935 (R. 43–44, 156–159). About December 15, 1935, Rens, an attorney or investigator for the United States Industrial Alcohol Corporation, reported to Dunigan that the members of the smuggling ring, including Leveque, were meeting in the Hotel Astor lobby and were making telephone calls and sending tele-

grams from the telephone pay stations and Western Union desk in the lobby (R. 45, 114–115). Dunigan then sent the informer, Murray, to Leveque on the pretense of getting a job as a radio operator (R. 45–46) and Murray talked with Leveque concerning the latter's smuggling operations (R. 184–185). On December 16 investigator Dunn observed Leveque together with petitioners and others at the Hotel Astor (R. 47–48, 160–161). It was not until after Dunigan had all of this information that any telephone messages were intercepted or any telegraphic communications obtained.

On March 20, 1936, Leveque and others were arrested at the Belfort Restaurant upon an indictment returned in the Eastern District of South Carolina (R. 62–63, 145–146). Petitioner Nardone was arrested at the same time (*ibid.*). Leveque was also indicted in the Southern District of New York (R. 183, 213, 275, 294). He pleaded guilty to both indictments and was sentenced to 18 months' imprisonment on each, the sentences to run concurrently (R. 183, 213, 275). Not until he was released from the penitentiary in the early part of 1938 did he indicate any willingness to assist the Government (R. 77–78, 83–84). His motives for doing so then are apparent. He was under federal indictment in New Jersey for resisting officers with firearms at the time the investigators and smugglers engaged in a shooting exchange (R. 78), and he sought to convince the Government that that

charge was unfounded (R. 78–79). He did not testify at either of the first two trials (R. 84), but only at the trial in the instant case, and he did not confess until 1938 (R. 83–84), after this Court had ruled in the first *Nardone* case (302 U. S. 379) that wire tapping evidence was inadmissible.

The Government officers in charge of the investigation and preparation of the case testified that neither Leveque nor any other witness was ever confronted with any tapped messages or any information obtained from them and that the taps were not used to refresh the recollection of any witness (R. 55, 79, 81). Petitioners do not assert that the taps served to induce Leveque to become a Government witness or to refresh his recollection (see Pet. 14). They state only that taps and one money order were adverted to when the Government agents questioned him prior to the trial (Pet. 14).[3] The trial court expressly found, however, that no Government witness was obtained by reason of any intercepted communications and that no use was made of such communications to induce any

[3] Leveque's testimony, upon which petitioners rely, supports their contention only in part. Leveque stated that "at some time" the prosecutor told him that his telephone calls had been tapped (R. 274), but later said that the subject was never mentioned to him (R. 274–275). He also stated that "they" showed him a telegraphic money order and asked him if he had sent it (R. 275). Leveque testified at the preliminary hearing (R. 183), but petitioners' attorneys did not attempt to show through him that his testimony was induced by any illegal interceptions (see R. 186).

witness to turn state's evidence or to refresh the recollection of any witness (R. 208).

Geiger.—Dunigan knew before December 17, 1935, that Geiger was associated with Leveque (R. 46, 160–161, 185). And, after the interceptions began, there was much independent evidence of Geiger's association with the ring (R. 61, 142–145) and involvement in its activities (R. 174–175). Geiger was arrested with Leveque at the Belfort Restaurant on March 20, 1936, upon the federal indictment returned in South Carolina (R. 62, 145). He pleaded guilty to that indictment and served a jail sentence (R. 414–415). In 1938 Leveque, with whom Geiger had been on friendly terms for some years (R. 424–425), brought Geiger to Dunigan's office (R. 76–77), Leveque having decided to assist the Government in order to assist himself. Geiger agreed to testify for the Government and Dunigan then sent him to the United States Attorney's office where Geiger gave a statement (R. 76, 82). There is no assertion or evidence that Geiger was induced to testify, or that his memory was refreshed, by any intercepted communications.

II

Petitioners contend (Pet. 10, 17–18) that the trial court erred in refusing to grant their request (R. 528) to charge the jury that no act or declara-

tion of a conspirator might be considered against another conspirator unless the jury was satisfied beyond a reasonable doubt that the latter had entered into the conspiracy at the time. Such a charge, however, would have been erroneous. It is settled that one who joins a criminal conspiracy becomes as accountable for the acts done prior to his membership as are the original conspirators. *Manton* v. *United States,* 107 F. (2d) 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States,* 91 F. (2d) 691, 696 (C. C. A. 9); *McDonald* v. *United States,* 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Laska* v. *United States,* 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Baker* v. *United States,* 21 F. (2d) 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621. The charge given by the judge was in accordance with this rule.[4]

Petitioners' assertion (Pet. 17–18) that the record discloses a number of separate conspiracies carried out by different groups, instead of the single conspiracy charged in the indictment (R. 8–18), is unsupported by any record reference and is contrary to the evidence.

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[4] The judge charged the jury, *inter alia*, that "where there is a conspiracy going and somebody comes in the conspiracy after it is initiated and while it is going he becomes a co-conspirator, he is bound by everything done during the conspiracy" (R. 528. See also R. 525–526).

CONCLUSION

The case was correctly decided below and presents no question of importance not already resolved by this Court in the second *Nardone* and *Goldstein* cases. There is no conflict of decisions. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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END OF A CASE